

No. 20-303

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JOSÉ LUIS VAELLO-MADERO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF OF THE MEMBERS OF THE
CONGRESSIONAL SHADOW DELEGATION OF
PUERTO RICO AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

John F. Nevares
Counsel of Record for Amicus Curiae
VIG tower, Suite 1504, 1225 Ponce de Leon Ave, SJ PR
jfnevaras@nevareslaw.com
787-722-9333

i.

QUESTION PRESENTED

Whether Congress violated the equal-protection component of the Due Process Clause of the Fifth Amendment by establishing Supplemental Security Income —a program that provides benefits to needy, aged, blind, and disabled individuals — and excluding from this national program otherwise qualified citizens solely because they reside in Puerto Rico, a politically powerless U.S. territory that has been subject to Congressional control for over 120 years.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	4
I. PUERTO RICANS ON THE ISLAND RESIDENTS ARE THE QUINTESSENTIAL EXAMPLE OF POLITICAL POWERLESSNESS	4
II. EXCLUDING CITIZENS WHO MEET SSI ELIGIBILITY CRITERIA DOES NOT FURTHER LOCAL “SELF-RULE” OR REFLECT PUERTO RICO’S “UNIQUE” OR “UNPARALLELED” RELATIONSHIP TO THE UNITED STATES	8
CONCLUSION.....	13

TABLE OF AUTHORITIES

Page

CASES

<i>Balzac v. Porto Rico</i> , 258 U.S. 298 (1922)	2
<i>Downes v. Bidwell</i> , 182 U.S. 244 (1901)	2
<i>Examining Bd. of Engineer, Architects, & Surveyors v. Flores de Otero</i> , 426 U.S. 572 (1976)	10
<i>Financial Oversight & Management. Board. v. Aurelius Inv., LLC</i> , 140 S. Ct. 1649 (2020)	5
<i>In re Financial Oversight and Management Board for Puerto Rico</i> , 916 F.3d 98, 112-113 (1 st Cir. 2019)	6
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	2,9
<i>Puerto Rico v. Sánchez Valle</i> , 136 S. Ct. 1863 (2016)	5,10
<i>U.S. v. Laboy-Torres</i> , 553 F.3d 715, 721 (2009)	10

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8, cl. 1	10
U.S. Const., Art. IV, § 3, cl. 2	11

TABLE OF AUTHORITIES—Continued

	Page
U.S. Const., amend. V	i,3,12

CODES, RULES AND STATUTES

Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. § 2142.....	5
--	---

Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, 26 U.S.C. § 951A.....	6
---	---

Act No. 167-2020 of the Puerto Rico Legislative Assembly.....	2
--	---

MISCELLANEOUS

<i>Support to the Board continues to drop</i> , El Nuevo Dia (November 9, 2019), https://www.elnuevodia.com/english/news/story/su pport-to-the-board-continues-to-drop/	6
---	---

**STATEMENT OF INTEREST OF *AMICUS*
*CURIAE*¹**

For over 120 years, Puerto Rico has been subject to U.S. control. During that time, Puerto Ricans, all U.S. citizens, have had no vote in Congress or in presidential elections. Congress has never enacted a law providing for constitutionally available status options to Puerto Rico, provided a constitutionally sanctioned process of selfdetermination, or agreed to be bound by the will of the people of Puerto Rico as expressed by their democratically elected leaders or as the result of democratically conducted local Puerto Rico referenda. The U.S. has held Puerto Rico in a state of political powerlessness, both excluding the island from voting participation at the federal level and denying it the opportunity for meaningful self-determination. At its sole discretion and acting unilaterally, Congress mandates the application of federal law to Puerto Rico or excludes Puerto Rico from federal legislation. In short, when it comes to Puerto Rico, Congress giveth and Congress taketh away, at will.

Congress' power over Puerto Rico is not accidental. Rather, it is invidiously discriminatory -- the end result and application of a series of early 20th Century Supreme Court cases commonly referred as the

¹ Pursuant to Supreme Court Rule 37.3, the Puerto Rico congressional shadow delegation informs that all parties have consented to the filing of this Brief. This Brief was not authored in whole or in part by counsel for a party, and no one other than *amici curiae* or its counsel has made a monetary contribution to the preparation or submission of this Brief. The congressional shadow delegation includes the following members: Ricardo Rosselló, Melinda Romero Donelly, Roberto Lefranc Fortuño, Maria Meléndez Altieri, Elizabeth Torres and Zoraida Buxó.

Insular Cases. Starting with *Downes v. Bidwell*, 182 U.S. 244 (1901) and ending with *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Supreme Court extended to Puerto Rico a doctrine similar to the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), under the innocuous-sounding doctrine of “incorporation,” a doctrine that ignores the plain text of the Constitution, its original interpretation, and the foundational principles of our democracy. And so, for 120 years almost to the day, the U.S. citizens of Puerto Rico remain constitutionally separate and unequal from their fellow stateside citizens, fully subject to the whims of Congress, with no voting representation at the federal level, and treated in a manner reminiscent of the manner that African-Americans were and are treated and for similar reasons: race, color, place of residence, and/or origin.

The Puerto Rico congressional shadow delegation (“Shadow Delegation” or “Delegation”) advocates for the empowerment of the People of Puerto Rico by admission to the Union. The Delegation was established by Act No. 167-202 of the Puerto Rico Legislative Assembly on December 30, 2020 and consists of two shadow delegates to the U.S. Senate and four delegates to the U.S. House of Representatives. Puerto Rico democratically elected the current, and first, Shadow Delegation in a special election held on May 16, 2021. The Shadow Delegation commenced its current term on July 1, 2021.

As duly and democratically elected representatives of the people of Puerto Rico, the Shadow Delegation has a compelling interest in securing for Puerto Ricans the rights enjoyed by all fellow American citizens. The Shadow Delegation therefore submits this

Amicus Curiae Brief in support of its position that excluding citizens, such as Vaello-Madero, from receiving SSI simply based on their residency in Puerto Rico is but an egregious example of Congressional discrimination against identifiable and politically powerless insular minorities in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Residents of Puerto Rico are the embodiment of politically powerless identifiable minorities subject to discrimination by a Congress in which they have no voting representation and a President for whom they cannot vote. Examples of Puerto Rico's political powerlessness are myriad; indeed, they are the norm. But three examples, two of them recent and one endemic, exemplify the rule. As further discussed below, Congress unilaterally imposed on Puerto Rico a fiscal oversight Board, commonly referred to as the PROMESA Board ("Fiscal Board" or "Board"), thereby handing over to unelected federally appointed officials, powers previously exercised by local government-elected officials. Second, in 2017, Congress imposed an excise tax on goods and services from Puerto Rico right on the heels of the devastation wrought by Hurricane Maria. Third, Congress continues its historic underfunding for Medicaid recipients in Puerto Rico.

Here, the Court has before it yet another insidious example of Puerto Rico's powerlessness: exclusion of eligible U.S. citizens residing in Puerto Rico from Supplemental Security Income (SSI). The U.S. seeks to revoke Respondent's, José L. Vaello-Madero's, SSI benefits since he moved from New York to Puerto Rico

because, as determined by the Insular Cases, Congress can unilaterally decide that Puerto Rico is “outside of the United States.” Pet.App.4a; J.A. 39, 45. And it does so in the most pernicious of ways, suing Vaello-Madero -- a disabled SSI recipient who moved to one of the poorest municipalities in Puerto Rico to take care of his ailing wife -- in federal court for alleged misappropriation of funds under both civil and criminal statutes and then presenting him with a stipulation for his signature without the presence of an attorney. J.A. 19, 25, and 37. Vaello-Madero is the personification of political powerlessness: an indigent U.S. citizen of mixed race and Hispanic heritage residing in the U.S. territory of Puerto Rico.

ARGUMENT

I. PUERTO RICO RESIDENTS ARE THE QUINTESSENTIAL EXAMPLE OF POLITICAL POWERLESSNESS

Political powerlessness of a readily indefinable minority is the byword for U.S. citizens residing in Puerto Rico. The U.S. citizens who reside in Puerto Rico do not vote in Presidential elections. Because Puerto Rico has no senators and only a non-voting resident commissioner, residents of Puerto Rico are not able to meaningfully participate in the process of negotiation, revision, and voting in favor or against federal legislation, including legislation that has a direct and distinct impact on the island. The Shadow Delegation is but the projection of Puerto Rico’s inherent powerlessness.

Among many, three examples exemplify Puerto Rico’s powerlessness. The first example is the unilateral and undemocratic imposition of a seven-member oversight Fiscal Board on the people of Puerto Rico.

snomic Stability Act (PROMESA), 48 U.S.C. § 2101 *et seq.* The Board, composed of unelected officials appointed by the President, has and routinely exercises the authority to supervise and modify Puerto Rico’s laws and budget and, in its sole discretion may and indeed has, rejected proposed budgets it has deemed not in compliance with the Board’s fiscal plan for Puerto Rico. 48 U.S.C. § 2142. The only locally elected official on the Board is the Governor of Puerto Rico who ironically, like the resident commissioner in Congress, has no vote on the Board. The Board has imposed draconian cuts to Puerto Rico’s budget, modified and stopped some laws from going into effect laws, and even threatened the continued viability of the healthcare system. See *Financial Oversight & Management Board. v. Aurelius, Inv., LLC*, 140 S. Ct 1649, 1655 (2020) (Sotomayor, J.).

The imposition of a Fiscal Board on Puerto Rico is only possible because Congress has unilaterally rescinded the state-like local self-rule enjoyed by Puerto Rico since 1952; appointed federal unelected officials to the Board; and made patent that Congress is the “ultimate source” of Puerto Rico’s power. *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1876 (2016). The Board has in effect supplanted many of the powers of the local democratically elected government of Puerto Rico and its ability to determine, enact, and carry out local fiscal policy. The undemocratically accrued power of the Board makes the residents of Puerto Rico the very definition of the politically powerless.

The PROMESA Act was condemned by the vast majority of the people of Puerto Rico.² An undemocratic imposition of Congressional will on the people of Puerto Rico, the Board's extensive powers reach and effectively control or challenge most decisions made by the local government. The Board routinely intrudes in the local policy development processes, creates operational delays on budget reapportionments, frequently reformulates fiscal plans that hinder the proper execution of government initiatives, is not accountable to the public for its actions, and makes many decisions that are not subject to judicial review.³ Given its myopic goal in reducing the territory's expenditures through undemocratic means, the Board has, in effect, eradicated the "fiscal autonomy" of Puerto Rico, namely, the ability of Puerto Rico, like any other state in the Union, to make its own local fiscal decisions, so long as they are not contrary to the U.S. Constitution and federal laws, rules, and regulations. Rather, it is a painful reminder of the political powerlessness of the residents of Puerto Rico.

A second example is the imposition in 2017 of excise (GILTI)⁴ taxes on goods and services produced by U.S. corporations doing business in foreign jurisdictions. *Tax Cuts and Jobs Act of 2017*, Pub. L. No. 115–97, 26 U.S.C. § 951A. Because Congress treats Puerto Rico as a foreign jurisdiction, companies from the

² *Support to the Board continues to drop*, El Nuevo Día (November 9, 2019), <https://www.elnuevodia.com/english/news/story/support-to-the-board-continues-to-drop/>.

³ See *In re Financial Oversight and Management Board for Puerto Rico*, 916 F.3d 98, 112–113 (1st Cir. 2019).

⁴ Global intangible low-taxed income.

mainland U.S. doing business in Puerto Rico were hit with the tax, which had the effect of reducing Puerto Rico's attractiveness as a business jurisdiction. And this happened during one of the most vulnerable moments in the history of Puerto Rico, not long after hurricane Maria's devastating impact on the island.

Despite reiterated requests by the then Governor of Puerto Rico, and current Shadow Delegate Ricardo Rosselló, and the island's resident commissioner, Congress rejected Puerto Rico's request to insert a provision in the Act providing that Puerto Rico would be treated as part of the United States for purposes of the Act. The GILTI tax does nothing to further local "autonomy," and most certainly not in any positive respect. Rather, it is a painful reminder of the politically powerless residents of Puerto Rico.

A third example is the recurring and agonizing inequality and upcoming funding cliff for Medicaid recipients in Puerto Rico. Unlike the states, where Medicaid funding is open-ended, Puerto Rico's access to funds is subject to an annual ceiling established by Section 1108(g) of the Social Security Act. 42 U.S.C. § 1308. This method of funding results in less than equal treatment for the residents of Puerto Rico. While Medicaid in the states is funded based on a federal formula, Medicaid allocation to Puerto Rico is a block grant that provides the island with substantially less funds than what the formula provides to the states. As a result, Medicaid recipients in the island receive limited benefit packages and lower eligibility levels than states, lower provider payment levels, and slow adoption of key administrative systems and processes.

But most troublesome is that the Medicaid block grant to Puerto Rico must be renewed. Currently, and

as is routinely the case, Puerto Rico's Medicaid funding is facing a funding cliff that threatens access to quality care for hundreds of thousands of U.S. citizens in Puerto Rico. The cliff also threatens the local government's ability to support a strong, reliable, and resilient healthcare system, as well as its ability to comply with PROMESA fiscal plans. In fact, the Board has assumed in the past that Medicaid will not be extended to the island, requiring additional draconian cuts to the proposed budgets in order to account for unfunded Medicare coverage. If current law is left unaltered, Puerto Rico will have no choice but to raise eligibility requirements and drop hundreds of thousands of Medicaid beneficiaries from the program and/or make significant cuts in benefits that could negatively impact all areas of medical coverage, including dental, vision, and possibly even prescription drug coverage. Indeed, it will likely cause a collapse in the provider population of physicians, nurses, and other skilled healthcare professionals in Puerto Rico, all in the midst of a pandemic.

Congressional systematic underfunding of Medicaid for Puerto Rico, and the constant threat of a funding cliff, is perhaps the single most egregious example of how the politically powerless residents of Puerto Rico are subjected to discrimination not visited citizens residing in the states. Medicaid allocation to Puerto Rico does not further local autonomy; it is constitutionally sanctioned discrimination against U.S. citizens.

II. EXCLUDING CITIZENS WHO MEET SSI ELIGIBILITY CRITERIA DOES NOT FURTHER LOCAL “SELF-RULE” OR REFLECT PUERTO RICO’S “UNIQUE” OR “UMPARALLED” RELATIONSHIP TO THE UNITED STATES

In its brief, Petitioner argues that denying SSI benefits is essentially a proxy for Congress’s promotion of “local self-rule.” Petitioner’s Br. 10, 23. Nothing of the sort. Denial of SSI benefits to residents of Puerto Rico is a quintessential example of the use of Congressional power to deny a politically powerless identifiable insular minority -- mixed race citizens of Hispanic heritage in Puerto Rico -- access to a national program by recourse to a line of cases, and reasoning, that dates back to the Insular Cases and, before that to *Plessy v. Fergusson*. Certainly, Petitioner is aware that Congress has not exactly been a big proponent of Puerto Rico’s so-called “local self-rule,” having created and imposed a Fiscal Board on Puerto Rico that has in effect eviscerated one of the most important indicia of meaningful “local self-rule,” namely, control of fiscal policy and empowered a Fiscal Board that has veto power over certain statutes, rules, and regulations that have an effect on, or are affected by, local fiscal policy.

Not surprisingly, Petitioner does not mention PROMESA in its brief; glosses over the fact that the Board was imposed on the politically powerless residents of Puerto Rico; and seems to overlook the obvious: that the Board was widely opposed by residents of Puerto Rico who had no vote in the very Congress that created the Board and who could not vote for the President who appointed the members to the Board. The residents of Puerto Rico do not even have a local

democratically elected official with a vote on the Board. So much for the promotion of “local self-rule.”

However, Petitioner leaves no stone unturned and makes repeated references to the so-called “unique” and/or “unparalleled” relationship between Puerto Rico and the United States. For Petitioner, these terms seem to have the talismanic effect of rendering constitutional the egregious exclusion of the poorest of the poor of a politically powerless insular minority from SSI coverage. But Petitioner is playing loose with terminology without placing it in proper context.

Puerto Rico is essentially a U.S. territory that has been, over time, organized in the nature of a state by Congress. *Examining Bd. of Engr’s, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 597 (1976) (in 1952, Puerto Rico was granted “a measure of autonomy comparable to that possessed by the States.”); see also *U.S. v. Laboy-Torres*, 553 F.3d 715, 721 (2009) (O’Connor, Associate Justice, (retired) (“Puerto Rico possesses a measure of autonomy comparable to that possessed by the states” and “... although Puerto Rico is not a state in the federal Union it seems[s] to have become a State within a common and accepted meaning of the word.”). Like every state, Puerto Rico now has a local constitution; local laws and regulations; local and popularly elected officials; a local judiciary; and an Article III Court – all fully subject to the U.S. Constitution, the U.S. Supreme Court, federal laws, and regulations. But unlike the states, Puerto Rico is subject to the plenary powers of Congress when Congress legislates for Puerto Rico in its capacity as the local government for the territory under Article IV, Section 3, Clause 2 of the United States Constitution, as it did when it enacted the PROMESA law and

basically destroyed Puerto Rico’s local fiscal “autonomy,” but not when it legislates under its national authority under Article 1, Section 8, Clause 1, as it did when it created SSI.

Puerto Rico is not an independent country; its constitution was unilaterally amended by Congress and was presented to Puerto Rico as a take it or leave it proposition; Congress, not Puerto Rico, is the ultimate source of Puerto Rico’s power, *Puerto Rico v. Sánchez Valle*, 136 S. Ct 1863 (2016). Puerto Rico is barred from entering into treaties, establishing foreign relations, or trading with foreign countries; has no local currency; effects no monetary policy, and does not hold a seat and is not recognized as a country by the United Nations. It does not even have its own postal service. Puerto Rico is home to 3.2 million U.S. citizens and, as noted above, cannot vote for the President and has no voting representatives or senators in a Congress that recently imposed on it the Board that, to a significant extent, runs the fiscal policy of the island without the vote of a single locally elected official.

Yes, Puerto Rico’s relation to the United States is “unique” and “unparalleled,” but only in the sense that as of its last organization by federal statute in 1952, no other U.S. territory had been organized with a government structure (executive, legislative and judicial) and fiscal autonomy so closely similar to that enjoyed by the states. But that is where Puerto Rico’s “unique” and “unparalleled” relationship to the U.S. begins and ends.

To be sure, Puerto Rico’s relationship with the rest of the U.S. can, in a different sense, be said to be “unique;” but only in that Congress has often singled out Puerto Rico’s U.S. citizens and deprived them of

equal treatment afforded to U.S. citizens in the 50 states. In short, Puerto Rico — and by extension Vaello-Madero — are treated by Congress in uniquely unequal ways, separate and unequal, all in violation of the Fifth Amendment.

As amply established by Vaello-Madero and other *amici*, Petitioner has not shown a compelling interest in discriminating against the powerless and readily identifiable U.S. citizens residing in the territory of Puerto Rico, nor has it shown that exclusion of residents of Puerto Rico from SSI is narrowly tailored and is the least restrictive means to achieve a desired purpose. Indeed, as shown by Vaello-Madero and others, the Petitioner's arguments do not even show that the exclusion is rationally related to a legitimate government interest, as was correctly held by the courts below.

The powerlessness of the People of Puerto Rico is precisely the reason why the Puerto Rico Legislature created the Shadow Delegation. It is our duty to responsibly advocate for our people's inalienable rights as U.S. citizens. We therefore respectfully submit that excluding citizens who meet the criteria for SSI simply because they reside in Puerto Rico and are therefore politically powerless and readily identifiable as citizens of mixed race and Hispanic heritage, violates the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the First Circuit should be affirmed.

Respectfully submitted,

John F. Nevares
Counsel of Record for Amicus Curiae
1225 Ponce de Leon Ave, VIG tower, Suite 1504, SJ PR
jfnevar@nevarslaw.com
787-722-9333